

Christopher J. Reichman SBN 250485
chrissr@prato-reichman.com
Justin Prato, SBN 246968
justinp@ prato-reichman.com
PRATO & REICHMAN, APC
8555 Aero Drive, Suite 303
San Diego, CA 92123
Telephone: 619-683-7971

Attorney for all Plaintiffs

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID MEYER, et. al.

Plaintiff,

VS.

CAPITAL ALLIANCE GROUP, et. al.,

Defendants.

Case No.: 15-CV-2405-WVG

**OBJECTIONS TO
DEFENDANTS' UNTIMELY
MOTION TO DISMISS
PURSUANT TO F.R.C.P.
12(b)(6),
AND MEMORANDUM OF
POINTS AND AUTHORITIES
IN OPPOSITION IN THE
ALTERNATIVE**

**Hon. William V. Gallo
Hearing Sept 18, 2017, 2:00 pm**

OBJECTION #1

Defendants are not allowed to file a second post-answer motion to dismiss under Federal Rule of Civil Procedure (“Rule”) 12(b)(6) or 12(b)(1). There are two separate bars to such a motion. Rule 12(b) itself states, “A motion asserting any of these [12(b)] defenses must be made before pleading if a responsive pleading is allowed.” Furthermore, Rule 12(g)(2) states, “Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make

1 another motion under this rule raising a defense or objection that was available to
 2 the party but omitted from its earlier motion.” Rule 12(b) itself requires filing
 3 before an Answer is made, and Rule 12(g)(2) disallows filing successive motions
 4 to dismiss.

5 The operative Second Amended Complaint (“SAC”) was filed in San Diego
 6 Superior Court on August 3, 2015. [Dckt. No. 1-1]. The SAC named a new
 7 defendant and, after she was served on October 12, 2015, Defendants removed the
 8 case to this District Court on October 21, 2015. [Dckt No. 1]. The moving
 9 Defendants filed a previous motion to dismiss in this District Court, “pursuant to
 10 FRCP 12(b)(6)”, on March 10, 2016. [Dckt. No. 8, p. 2, ln. 7 (page and line
 11 numbers hereinafter represented as ‘2:7’)]. This prior motion to dismiss was
 12 timely filed before any Answer. This Court denied the prior motion to dismiss on
 13 April 4, 2016. [Dckt. No. 12]. The moving Defendants thereafter filed an Answer
 14 to the SAC. [Dckt. No. 14]. Defendants have filed the instant motion, “under
 15 Federal Rule of Civil Procedure 12(b)(6) . . . and 12(b)(1). [Second Motion to
 16 Dismiss Second Amended Complaint, Dckt. No. 48 (hereinafter “2nd MTD”),
 17 2:10-13].

18 A Rule 12(b) motion may only be made prior to filing and Defendants are
 19 barred from filing a second Rule 12(b) motion to dismiss by Rule 12(g)(2). Post
 20 answer Rule 12(b) motions are regarded as “untimely” and not allowed. *Elvig v.*
 21 *Calvin Presbyterian Church*, 375 F3d 951, 954 (9th Cir. 2004). Plaintiffs,
 22 therefore object to the entirety of the instant late-filed Rule 12(b) motion and
 23 request that it be stricken or dismissed in its entirety.

24 Technically, the Ninth Circuit has held that, “we should generally be
 25 forgiving of a district court’s ruling on the merits of a late-filed Rule 12(b)(6)
 26 motion” and may sometimes review it as if it were a motion for judgment on the
 27 pleadings made under Rule 12(c)—while keeping in mind that such a
 28 determination is more problematic than a Rule 12(b) motion since leave to amend

1 is not available under Rule 12(c). *In re Apple iPhone Antitrust Litigation*, 846 F.3d
 2 313, 317-20 (9th Cir. 2017). While a District Court should not entertain a late-
 3 filed Rule 12(b) motion after being made aware of the timing defect, the possibility
 4 that it will be entertained and allowed on appeal counsels caution in resting on this
 5 objection. Therefore, while not waiving this objection in any way, Plaintiffs' will
 6 provide opposition argument below to be considered only if this objection is
 7 denied.

8

9 **OBJECTION #2**

10 Defendants removed this case from state court to federal court and now in
 11 the instant motion to dismiss try to attack the jurisdiction of this court to decide the
 12 case. Defendants have either made a grave error in filing this motion or they are
 13 explicitly admitting they falsely asserted that this Court had jurisdiction when they
 14 unilaterally removed the case.

15 In their Notice of Removal, Defendants averred that, “[t]his Court has
 16 jurisdiction of this action under federal question jurisdiction”. [Dckt. No. 1, 1:27,
 17 see also 3:5-20]. In the instant late-filed motion to dismiss, the very first argument
 18 presented, Section II.A., is entitled, “The Court Should Dismiss Plaintiffs’ First
 19 Claim Because Plaintiffs Lack Article III Standing”. The entire argument of this
 20 section is a frontal attack on the case or controversy standing requirements to
 21 invoke federal subject matter jurisdiction. [2nd MTD, pages 6 through 10].

22 Defendants have apparently forgotten that they—not Plaintiffs—were the
 23 ones who invoked this Court’s federal subject matter jurisdiction. In fact,
 24 Plaintiffs filed a motion to remand the case back to state court, which was denied
 25 in no small part based on these jurisdictional averments of Defendants. [Dckt. No.
 26 3, 7]. Defendants cannot invoke federal court subject matter jurisdiction out of one
 27 side of their mouth and then attack it out of the other. Either Defendants have
 28 mistakenly attacked the jurisdiction they themselves invoked and the entire

1 argument should be stricken, or they have admitted that their Notice of Removal
 2 was falsely filed for an improper purpose like delay, and the Rule 11 sanctions
 3 should be imposed for all of Plaintiffs attorney's fees and costs in these federal
 4 proceedings before remanding the entire case back to the state court, which
 5 undoubtedly has jurisdiction.

6 "If at any time before final judgment it appears that the district court lacks
 7 subject matter jurisdiction, the case shall be remanded. An order remanding the
 8 case may require payment of just costs and any actual expenses, including attorney
 9 fees, incurred as a result of the removal." 28 U.S.C. § 1447, *see also, Mocek v.*
 10 *Allsaints USA Ltd.*, --- F. Supp. 3d ---, 2016 WL 7116590 (Dec. 7, 2016)
 11 (remanding after defendants removed then challenged standing, and awarding
 12 \$58,000 in attorney fees). However, the Court should note that pursuant to
 13 Objection #1, above, the current late filed motion to dismiss is not allowed and
 14 could only possibly be considered as a motion for judgment on the pleadings under
 15 Rule 12(c) and the only relief available under that motion is judgment, not remand.
 16 While the Court could conceivably deny judgment and *sua sponte* order remand,
 17 this problem just further shows why the Court should sustain Objection #1 and
 18 strike the entire motion to dismiss as improperly timed and ill-conceived at best.

19 For the foregoing reasons Plaintiffs object to the entirety of the Second
 20 Motion To Dismiss' first argument section, Section II.A, and request it be stricken.
 21 Out of an abundance of caution and without waiving this objection in any way,
 22 Plaintiffs argue that they do possess standing under the recent *Spokeo* decision in
 23 the alternative merits opposition below.

24 / / /

25 / / /

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27 / / /

OPPOSITION TO MOTION TO DISMISS

(in the alternative if Objection #1 and/or #2 is not sustained)

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20 <i>Dworkin v. Hustler Magazine Inc.,</i>	21 867 F.2d 1188, 1192 (9th Cir. 1989)	11
22 <i>Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.,</i>	23 896 F.2d 1542, 1550 (9th Cir.1989)	11
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26		
27		
28		

1 I. INTRODUCTION

2 Defendants' late-filed purported 12(b) Motion To Dismiss—their second
3 pleadings attack in this Court--should be stricken in its entirety for the reasons in
4 Objection #1. The following merits opposition is proffered solely on the off-
5 chance that the Court elects to convert the motion to a motion for judgment on the
6 pleadings, which the Court should not do once the problem of the late filing has
7 been raised, even if appellate courts may do so in cases of mistake to mitigate the
8 effects of the mistake at the trial court level.

9 Defendants' motion is spurious at best on the merits being filled with
10 conclusory half-formed arguments and basic mistakes of law. Defendants' motion
11 as directed to the primary gravamen of the SAC, the TCPA and California "little
12 TCPA", claims for the illegal junk faxes, is based entirely on their mistake in not
13 seeing the "and" that connects together the three required elements of the
14 established business relationship" affirmative defense. Since they missed the
15 "and", they thought showing one of the three required elements was a defense, but
16 this obviously wrong from the clear text. The remainder of the motion attacking
17 secondary claims or claims plead in the alternative makes similar mistakes. For
18 example, claiming that the economic loss of money only damages requirement
19 added to California's Unfair Competition Law by Proposition 64 somehow applies
20 to causes of action that Proposition 64 never amended or had anything to do with.
21 The motion also forgets entirely that regardless of the Proposition 64 law, actual
22 economic harm was repeatedly plead in the SAC.

23 The following brief offered only if Objection #1 is not sustained. It
24 addresses each argument in Defendants' motion and does so paralleling the
25 numbering convention of Defendants' brief for the convenience of the Court.

26 ///

27 ///

28 ///

II. STANDARD OF REVIEW

As discussed above in Objection #1, Defendants are barred from this purported Rule 12(b) motion both by the timing requirement of Rule 12(b) itself and Rule 12(g)(2) since they already filed a previous motion to dismiss. Therefore, and consideration of the merits of the case must be made under Rule 12(c). A Rule 12(c) motion is functionally identical to a Rule 12(b)(6) motion to dismiss for failure to state a claim, and therefore the same legal standard applies, but with the notable exception that a motion for judgment on the pleadings leaves no room for amendment to cure and thus should be treated more carefully. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989), *see also, Cafasso v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 n. 4 (9th Cir. 2011). “Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law.” *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir.1989).

III. ARGUMENT

A. Plaintiffs Do Not Lack Article III Standing.

Defendants' first argument section, Section II.A, claims it is attacking Plaintiffs' Article III standing under the "concreteness" prong of the "injury-in-fact" requirement. *See, Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("*Spokeo*"), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992). Defendants correctly state that *Spokeo* requires a 'de facto' injury that actually exists. They then incorrectly misquote *Spokeo* to try to falsely equate actual injury with economic injury, and then confusingly proceed to mistakenly try to apply an established business relationship opt-out defense to somehow make Plaintiffs' alleged *prima facie* harm magically go away. The argument is

1 conclusory at best and confusing at worst, but Plaintiffs will address the *Spokeo*
 2 jurisprudence regarding the low level of intangible harm required to be alleged for
 3 TCPA cases, explain Defendants' mistaken reading of the inapplicable affirmative
 4 defense, and finally show that even if defendants were to prevail they are not
 5 entitled to dismissal, only remand to the state court after paying the costs and fees
 6 for improper removal.

7 The Supreme Court in *Spokeo* expressly rejected the only-economic-harm
 8 argument: “‘Concrete’ is not, however, necessarily synonymous with ‘tangible’.
 9 Although tangible injuries are perhaps easier to recognize, we have confirmed in
 10 many of our previous cases that intangible injuries can nevertheless be concrete.
 11 [citations omitted]” *Id.*, at 1549. The *Spokeo* Court went further, ruling that
 12 “Congress has the power to define injuries and articulate chains of causation that
 13 will give rise to a case or controversy where none existed before.” *Id.* Plaintiff
 14 still must allege some sort of intangible concrete injury, but that a plaintiff “need
 15 not allege any additional harm beyond the one Congress has identified.” *Id.*

16 The harm Congress identified in enacting the TCPA was the invasion of
 17 privacy and annoyance caused by “intrusive nuisance calls”. *Mims v. Arrow Fin.*
 18 *Services, LLC*, -- U.S. --, 132 S.Ct. 740 (2012). Since the *Spokeo* ruling the huge
 19 majority of courts deciding TCPA cases—20 of them so far and counting—have
 20 ruled that simply pleading intangible invasion of privacy harm is sufficient for
 21 Article III standing.¹ The Ninth Circuit has now ruled that TCPA violations by

22
 23 ¹ Post-*Spokeo* TCPA decisions finding allegations of invasion or privacy and/or other intangible harm sufficient for
 24 Art. III standing, with the more developed opinions first: *Mey v. Got Warranty, Inc.*, 2016 WL 3645195 (N.D. W.V.
 25 June 30, 2016) (finding that unwanted calls cause both monetary injury by wasting minutes and electricity and, more
 26 importantly intangible harm by invasion of privacy and intrusion and wasting time), *LaVigne v. First Community*
Bancshares, Inc., 2016 WL 6305992, *1-7 (D. N.M. Oct., 19, 2016) (in depth analysis of recent district court
 27 opinions and ruling that pleading of invasion of privacy is all that is necessary in TCPA claim), *Krakauer v. Dish*
Network L.L.C., 168 F.Supp.3d 843, 845 (M.D.N.C., Aug., 5, 2016) (in depth analysis of *Spokeo* rationales),
Cabiness v. Educational Financial Solutions, LLC, 2016 WL 5791411, *5 (N.D.Cal., Sept. 1, 2016), *Booth v.*
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 (N.D. Ill. Aug. 23, 2016), *Hewlett v. Consol. World Travel, Inc.*, 2016 WL 4466536, at *2 (E.D. Cal. Aug., 23,
 2016), *Ung v. Universal Acceptance Corp.*, 2016 WL 4132244, at *2 (D.Minn., Aug., 3, 2016), *Caudill v. Wells*

1 their very nature invade privacy and confer standing. *Van Patten v. Vertical*
 2 *Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (“Unsolicited
 3 telemarketing phone calls or text messages, by their nature, invade the privacy and
 4 disturb the solitude of their recipients.”).

5 The SAC adequately alleges the intangible harm of invasion of privacy and
 6 annoyance. [See, e.g., SAC, 11:14-19 (discussing the lawful and “non-offensive”
 7 alternatives to junk faxing)]. The SAC also goes further and adequately alleges
 8 tangible economic harm throughout. [See, e.g., SAC, 11:20-23, 15:19-23, etc.
 9 (direct economic damages allegations)].

10 Defendants’ Second Motion To Dismiss incorrectly claims that merely
 11 appending an opt-out notice to a fax ad somehow makes it TCPA-compliant. [2nd
 12 MTD 7:9-28]. The TCPA does not give any fax ad with an opt-out notice a free
 13 pass, the TCPA makes sending fax ads illegal and then provides two limited
 14 defenses: consent and “established business relationship. Consent is not in issue,
 15 and the opt out notice Defendants are talking about is just one of three required
 16 elements of the established business relationship defense. *See*, 47 U.S.C.
 17 227(b)(1)(C)(i through iii).

18 Defendants cite to TCPA subsection (b)(1)(C)(iii) in making their claim but
 19 elide any mention of the preceding subsections (i) and (ii). Their mistake is not
 20 following the “or” and “and” connections in subsections (b)(1)(C)(i), (ii), **and** (iii)

22
 23 *Fargo Home Mtg., Inc.*, 2016 WL 3820195, at *2 (E.D.Ky. July 11, 2016), *Cour v. Life360, Inc.*, 2016 WL
 24 4039279, at *2 (N.D.Cal. July 28, 2016) (ruling invasion of privacy is sufficient for Art III standing, dismissing
 25 complaint on issue of who “initiated” the call), *Dolemba v. Illinois Farmers Insurance Company*, 2016 WL
 26 5720377, *3 (N.D.Ill. Sept., 30, 2016), *A.D. v. Credit One Bank, N.A.*, 2016 WL 4417077, *7 (N.D.Ill. Aug 19,
 27 2016), *Holderread v. Ford Motor Credit Company, LLC*, 2016 WL 6248707, *2-3 (E.D.Tex. Oct., 26, 2016),
 28 *Griffith v. ContextMedia, Inc.*, 2016 WL 6092634, *1-2 (N.D. Ill. Oct. 19, 2016), *Espejo v. Santander Consumer*
USA, Inc., 2016 WL 6037625, FN3 (N.D. Ill., Oct. 14, 2016), *Brodsky v. HumanaDental Insurance Co.*, 2016 WL
 5476233, *10-11 (N.D. Ill., Sept. 29, 2016), *Physicians Healthsource, Inc. v. A-S Medication Solutions, LLC*, 2016
 WL 5390952, FN3 (N.D. Ill. Sept. 27, 2016), *Juarez v. Citibank, N.A.*, 2016 WL 4547914, *2-3 (N.D. Cal. Sept. 1,
 2016), *Fauley v. Drug Depot, Inc.*, 2016 WL 4591831, *3 (N.D. Ill. Aug 31, 2016), *Adamo v. Synchrony Bank*, 2016
 WL 3621129 (M.D. Fla. July 6, 2016).

1 to see that all three are required elements of the established business relationship
2 defense:

3 “(C) [it shall be unlawful] to use any telephone facsimile machine,
4 computer, or other device to send, to a telephone facsimile machine,
5 an unsolicited advertisement, unless—
6 (i) the unsolicited advertisement is from a sender with an established
7 business relationship with the recipient;
8 (ii) the sender obtained the number of the telephone facsimile machine
9 through—
10 (I) the voluntary communication of such number, within the
11 context of such established business relationship, from the
12 recipient of the unsolicited advertisement, or
13 (II) a directory, advertisement, or site on the Internet to which
14 the recipient voluntarily agreed to make available its facsimile
15 number for public distribution, except that this clause shall not
16 apply in the case of an unsolicited advertisement that is sent
17 based on an established business relationship with the recipient
18 that was in existence before July 9, 2005, if the sender
19 possessed the facsimile machine number of the recipient before
20 July 9, 2005; **and**
21 (iii) the unsolicited advertisement contains a notice meeting the
22 requirements under paragraph (2)(D)...”

23 47 U.S.C. 227(b)(1)(C) (emphasis added).²

24 Thus, whether the faxes had an opt out notice or not is irrelevant if the sender did
25 not have an established business relationship with the recipient beforehand and
26 obtained the fax number through voluntary communication of it by the sender. *Id.*

28 ² See also, 47 C.F.R. 64.1200(a)(4)(i – iii), detailing the same required three elements for a defendant to assert the established business relationship defense.

1 The SAC unequivocally and expressly avers that the Plaintiffs did not have
 2 any established business relationship with the Defendants. [SAC, 10:27-28, 14:25-
 3 26]. Where the first required element of an affirmative defense is repudiated by
 4 the Complaint no motion to dismiss can be supported regardless of what averments
 5 relate to other elements since all elements are required for the defense. Since
 6 Defendants' made a fatal mistake in basic statutory analysis by missing the all-
 7 important "and" linking the elements of the "established business relationship"
 8 defense together, their entire theory is fatally flawed.³

9 Finally, while Defendants request dismissal if they were somehow found to
 10 prevail in their jurisdictional attack, they forget that they—not Plaintiffs—invoked
 11 the limited jurisdiction of this Court. If the jurisdiction they claimed is actually
 12 lacking, the only available remedy is to remand the case back to the state court and
 13 impose costs and attorney's fees sanction for the waste of federal court time they
 14 improperly requested.

15 The statute at issue here, 28 U.S.C. § 1447(c), states: "If at any time before
 16 final judgment it appears that the district court lacks subject matter jurisdiction, the
 17 case shall be remanded." "[T]he literal words of §1447(c) . . . on their face, give . . .
 18 no discretion to dismiss rather than remand an action. The statute declares that,
 19 where subject matter jurisdiction is lacking, the removed case *shall* be remanded."
 20 *Int'l Primate Prot. League v. Admin's of Tulane Edu. Fund*, 500 U.S. 72, 89 (1991)
 21 (emphasis in original), *see also, Polo v. Innoventions International*, ___ F.3d. ___
 22 (9th Cir. Aug. 18, 2016) ("The rule that a removed case in which the plaintiff lacks
 23 Article III standing must be remanded to state court under § 1447(c) applies as
 24 well to a case removed pursuant to CAFA as to any other type of removed case.").
 25

26 ³ Defendants' reliance on *ARcare v. Qiagen North American Holdings, Inc.*, 2017 Lexis 8344 (C.D. Cal 2017), is
 27 misplaced and entirely off point since they cannot identify pleading allegations supporting all three required
 28 elements of the "established business relationship" defense. To the extent the unusual logic of that district court
 opinion may interpret *Spokeo* as requiring economic harm , such a conclusion would be out of step with the clear
 majority of courts requiring only intangible invasion of privacy and annoyance harm listed in FN1, above.

Furthermore, 28 U.S.C. § 1447(c), states: “An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” Rule 11 requires that any claim an attorney presents to the Court is warranted by existing law and “is not being presented for any improper purpose”, Rule 11 also allows for the imposition of sanctions for unwarranted and improper submissions. Defendants averred and warranted that this District Court had subject matter jurisdiction to hear this case when they motioned to remove the case to Federal court and are now trying to secure a dismissal by repudiating their own word. If the case is remanded now, Defendants’ falseness in claiming jurisdiction for removal would be the sole cause and would be a textbook example of the need for costs and attorney’s fees sanctions to offset the massive increase of cost and delay to Plaintiffs.

B. The SAC Adequately Alleges Standing For Claims Under B&P § 17538.43
and B&P § 17200.

Defendants make a conclusory claim in the Second Motion to Dismiss that the SAC did not plead economic harm. The SAC does, however, make direct economic harm allegations.

The SAC, in the B&P § 17538.43 claim section, clearly alleges: "Plaintiffs incurred actual damages as a result of the unsolicited facsimile advertisements, including loss of electricity, paper, and ink used to print the unsolicited facsimile advertisements, as well as repeated loss of use of Plaintiffs' fax machine and phone line." [SAC, 15:19-21]. The SAC also makes the same allegation for the TCPA claims that the B&P § 17200 claim is predicated upon. [SAC, 11:20-22]. The SAC also, in the B&P § 17200 claim section, refers back to these direct economic harm allegations: "As set forth in this complaint, Plaintiffs have suffered injury in fact and lost money or property as a result of Defendants' unfair competition." [SAC 22:4-5].

1 Thus, the SAC more than adequately pleads economic harm for all the
2 claims even if it is only required for §17200. Defendants also incorrectly assert
3 that both Cal Bus and Prof. Code § 17538.43 and Cal Bus and Prof. Code § 17200
4 require economic harm when in actuality only the latter does. Plaintiffs address
5 this mistake in more detail in their opposition to Defendants' Motion For Partial
6 Summary Judgment. The mistake is of little import here since this motion is
7 limited to the pleadings and the pleadings unequivocally allege economic harm
8 throughout.

9

10 **C. Plaintiffs' Third Claim Is Well Pleaded**

11 Defendants' attack on the pleading standard for the SAC's Third Claim is as
12 conclusory as the rest of their Motion To Dismiss. We agree that the elements for
13 the third claim violation are to: (1) initiate a call, (2) using any automatic telephone
14 dialing system, (3) to any residential number. Defendants' motion argument,
15 though, skips over the SAC paragraph 70 which details the time and date of each
16 alleged call to Plaintiff Moser. Instead they choose to quote the next catch-all
17 paragraph which just reserves rights for any more calls Plaintiff Moser may later
18 discover were made by Defendants. [SAC, 17:1-8]. SAC paragraph 70 clearly
19 alleges when Plaintiff received the calls at issue and that they were made by
20 Defendants using an automatic telephone dialing system. Since only Defendants
21 know the model number of the automatic telephone dialing system they used, no
22 further pleading specificity is possible, or needed. *See, Carolina Ca. Ins. Co. v.*
23 *Team Equipment, Inc.*, 741 F.3d 1082, 1086 (9th Cir. 2014), *citing with approval*,
24 *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2nd Cir. 2010) ("The *Twombly*
25 plausibility standard ... does not prevent a plaintiff from pleading facts alleged
26 'upon information and belief' [] where the facts are peculiarly within the possession
27 and control of the defendant"). Therefore the SAC third claim is well pleaded.

1 **D. Plaintiffs' Sixth Claim Is Unquestionably Entitled To a Private Right of**
 2 **Action, and Since The Fourth & Fifth Claims Are Merely Repetitive Of The**
 3 **Sixth Claim, Any Motion To Dismiss Them Is Moot.**

4 Defendants in their Second Motion to Dismiss the SAC argue based on one
 5 District Court opinion that there is no private right of action for violations of 47
 6 C.F.R. 64.1601(e), Plaintiffs' sixth claim. [2nd MTD, 13:11, 14:21]. Defendants
 7 are incorrect as to 47 C.F.R § 64.1601(e) and their case is to no avail since it
 8 merely makes guesses as to the interconnection of the TCPA statute and its
 9 attendant regulations, while the regulatory history contradicts those guesses.

10 Subsections (b) and (c) of the TCPA each separately grant a private right of
 11 action for violations of that subsection or the regulations prescribed under that
 12 subsection. 47 U.S.C. § 227(b)(3)(A) and (c)(5)(A). Thus, to have a private right
 13 of action the regulation at issue must have been promulgated under subsection (b)
 14 or (c) of the TCPA.

15 The FCC does not usually identify which specific TCPA subsection or later
 16 TCPA-amending law a regulation is promulgated under in its rulemaking orders.
 17 The federal register notices, likewise, do not identify the specific sections. Thus
 18 courts must sometimes dive into the murky waters of divining the FCC's intent
 19 from context in the orders. However, the genesis of 47 C.F.R 64.1601(e) is quite
 20 clear compared to some other regulations, so no such analysis is needed.

21 In the FCC's first Report and Order implementing the TCPA, there was
 22 discussion of what the FCC might do under the broad latitude of subsection (c).
 23 *Report and Order, Rules and Regulations Implementing the Telephone Consumer*
 24 *Protection Act of 1991*, 7 FCC Rcd. 8752, 8756-62, at para. 7-17 (1992) ("FCC
 25 1992 Order"). The entirety of Section B of the *FCC 1992 Order* discusses how to
 26 implement TCPA subsection (c), the first authority cited in footnote 7 is TCPA
 27 subsection (c), and no other citation is made to any other TCPA subsection. *Id.*
 28 Caller ID was discussed and the FCC considered having a special area code for

1 telemarketers, however these ideas were rejected for a number of reasons,
 2 including the lack of universal adoption of SS7 switching technology at that time,
 3 which was necessary for Caller ID. *FCC 1992 Order*, 7 FCC Rcd. at 8761-62, at
 4 para. 16-17. Also discussed but rejected back in 1992 was the creation of a Do Not
 5 Call Registry. *FCC 1992 Order*, 7 FCC Rcd. at 8761, at para. 14-15.

6 In 2003 Congress revisited the idea of Do Not Call Registry and ordered the
 7 FTC and FCC to make one and the FCC implemented its Do Not Call rules in
 8 *Rules and Regulations Implementing the Telephone Consumer Protection Act of*
 9 *1991*, 18 FCC Rcd. 14014 (2003) (“*FCC 2003 Order*”).⁴ The *FCC 2003 Order*
 10 makes a narrow rule that **only telemarketers** must transmit Caller ID and enacted
 11 it as 47 C.F.R. §64.1601(e). *FCC 2003 Order*, 18 FCC Rcd. 14014, 14118-23, at
 12 para.173-184; *see also, Rules and Regulations Implementing the Telephone*
 13 *Consumer Protection Act of 1991*, 71 FR 75122, 012006 WL 3623623 (December
 14, 2006) (recording amendment). The very first sentence of the Caller ID section
 15 of the *FCC 2003 Order* refers back to the prior *FCC 1992 Order* discussion of
 16 Caller ID, which was had under TCPA subsection (c). *FCC 2003 Order* at
 17 para.173. The entire Caller ID section of the *FCC 2003 Order* is replete with
 18 references back to TCPA subsection (c), which is no surprise given that almost the
 19 entirety of the order is concerned with creating and enforcing the Do Not Call
 20 Registry envisaged under TCPA subsection (c). So, the context would strongly
 21 indicate that the Caller ID requirement of 47 C.F.R. §64.1601(e) is promulgated
 22 pursuant to TCPA subsection (c).

23 But the even stronger argument is that there is no other subsection of the
 24 TCPA that 47 C.F.R. §64.1601(e) could possibly be promulgated under **because**
 25 **no other subsection is limited to telemarketing**. The TCPA requires all artificial
 26 or prerecorded voice calls to state the identity of the caller and their phone number

27
 28⁴ *See also*, Do-Not-Call Implementation Act of 2003, Pub.L. 108–10, codified at 15 U.S.C. § 6101 et. seq.

1 during the message in subsection (d), which has no private right of action. But that
 2 requirement is made on literally all artificial or prerecorded voice, not limited to
 3 telemarketing calls and the FCC would be far exceeding the scope of its
 4 Congressional authority if they limited a general prohibition required by statute to
 5 just a tiny subsection of calls.⁵ The TCPA also includes a subsection (e) having to
 6 do with Caller ID, but that is explicitly promulgated pursuant to the Truth in Caller
 7 ID Act, which was enacted in 2009, years after the *FCC 2003 Order*, which
 8 created 47 C.F.R. § 64.1601(e), and is therefore not the source. The only possible
 9 source is the TCPA subsection (c), because that is the only subsection or Caller ID-
 10 related statute dealing exclusively with telemarketing calls. All of the other TCPA
 11 subsections and Caller ID-related statutes go far beyond the narrow world of
 12 telemarketing calls. So, the only Congressional grant of authority the FCC could
 13 promulgate 47 C.F.R. § 64.1601(e) under is subsection (c) of the TCPA, which
 14 orders the FCC to, “initiate a rulemaking proceeding concerning the need to protect
 15 residential telephone subscribers’ privacy rights to avoid receiving telephone
 16 solicitations”. 47 U.S.C. § 227(c).

17 Now, moving on to the elements of the violation, 47 C.F.R 64.1601(e)
 18 requires that any, “person or entity that engages in telemarketing [] must transmit
 19 caller identification information.” Thus the elements are that Defendants:

20 1) engaged in telemarketing, and

21 a) did not transmit accurate Caller ID information, or

22 b) blocked the transmission of Caller ID information.

23

24 ⁵ The failure to see that TCPA subsection (d) applies to all prerecorded calls rather than being limited to
 25 telemarketing is the small but important mistake made by Maryland District Court in *Worsham v. Travel Options,*
Inc., 2016 WL 4592373, *4 (D. Md. 2016). The mistake is understandable since the Maryland District Court spends
 26 most of its analysis on 47 C.F.R. §64.1200(b)(1-2) rather than 47 C.F.R. §64.1601(e). While the Court’s logic
 27 regarding 47 C.F.R. §64.1200(b)(1-2) might be persuasive other courts have come to other conclusions using the
 28 same textual analysis method. See, e.g., *Charvat v. Echostar Satellite, LLC*, 621 F.Supp.2d 549, 558 (S.D. Ohio
 2008), remanded on other grounds, *Charvat v. Echostar Satellite, LLC* 630 F.3d 459 (6th Cir., 2010). Plaintiffs
 obviously agree with these other courts, but it is irrelevant in this case since 47 C.F.R. §64.1601(e) covers the same
 ground and is on firmer footing since TCPA subsection (c) and 47 C.F.R. §64.1601(e) are the only statute sections
 and code that are limited to telemarketing calls only.

1 The SAC paragraph 83 squarely alleges that Defendants were engaged in
 2 telemarketing and alleges that Defendants blocked the transmission of Caller ID
 3 for those calls. [SAC, 19:12-19]. Therefore, the sixth claim for violation of 47
 4 C.F.R 64.1601(e) under the private right of action in 47 U.S.C 227(c) is both
 5 legally justified and well pleaded.

6 The fourth and fifth claims under 47 C.F.R. §64.1200(b) are entirely
 7 repetitive of the 47 C.F.R 64.1601(e) since they similarly require identification of
 8 the caller and add no additional damages. As discussed above, a private right of
 9 action and statutory damages can only come from subsection (b) or (c) for each
 10 call. Any private right of action for them sourced in 47 U.S.C 227(b) would render
 11 them effectively moot since the calls themselves use up that private right of action.
 12 47 U.S.C. 227(b)(3)(A) (“an action based on a violation of this subsection”). Any
 13 private right of action sourced in 47 U.S.C 227(c) would render them effectively
 14 moot since the 47 C.F.R 64.1601(e), above, uses up that private right of action. 47
 15 U.S.C. 227(c)(5)(A) (“an action based on a violation of the regulations prescribed
 16 under this subsection to enjoin such violation”). Since the fourth and fifth claims
 17 provide no possibility of recovery beyond the sixth claim, and quite frankly the
 18 private right of action for the sixth claim is more certain, any motion to dismiss the
 19 fourth and fifth claims is moot since they are redundant anyway.

E. The California Legal Remedies Act Does Not Require Economic Harm

20
 21 Defendants again mistakenly try to claim a requirement for economic harm
 22 where there is none in attacking the SAC’s California Legal Remedies Act
 23 pleadings. *See*, Cal. Civ. Code § 1770 (“CLRA Section 1770”), Cal. Civ. Code §
 24 1780 (“CLRA Section 1780”). There is no requirement that the damages for the
 25 CLRA must be economic or specific damages within the parlance of California
 26 law.
 27
 28

1 The operative statute that contains the damages element for CLRA
 2 violations is CLRA Section 1780 which reads: “Any consumer who suffers **ANY**
 3 damages as a result of the use or employment by any person of a method, act or
 4 practice declared to be unlawful by Section 1770 may bring an action against that
 5 person.....” Cal. Bus. and Prof. Code § 1780(a) (emphasis added). In comparison,
 6 the damages provision for B&P § 17200 specifically states, “who has suffered
 7 injury in fact and has lost money or property”. Cal Bus and Prof. Code § 17204
 8 (“B&P § 17204”). Clearly the B&P § 17204 language is much narrower than
 9 CLRA Section 1780’s “any damages” language. Indeed, the California Supreme
 10 Court has ruled “any damages” in CLRA Section 1780 is a broader term than
 11 “actual damage”. *See, Meyer v. Sprint Spectrum L.P.*, 45 Cal.4th 634, 640 (2009)
 12 (“*Meyer*”). Therefore, Plaintiff Moser does not need to prove “economic” or
 13 “actual” damages, only “any” damages.

14 Under California law damages is broadly construed as suffering, “detriment
 15 from the unlawful act or omission of another”. Cal. Civ. Code § 3281. This is a
 16 very broad scope of damages that easily includes intangible harms like invasion of
 17 privacy and pain and suffering in addition to economic harms. No less than the
 18 Supreme Court of the United States has stated that intangible harms are
 19 recognizable harms that confer standing under the much stricter standing
 20 requirements of the United States Constitution. *See, Spokeo, supra*. In addition
 21 intangible harm such as lose of use of a phone line, has been shown to be a form
 22 damage that provides a basis for a claim under California law. *See, Thrifty-Tel,*
 23 *Inc. v. Bezenek*, 46 Cal. App. 4th 1564 (Cal. App. 4th Dist., 1996). Finally, it is
 24 clear that “any” damages includes, “transaction costs and opportunity costs”.
Meyer, supra, 45 Cal.4th at 640.

25 As discussed above, the SAC actually pleads both intangible harm and
 26 economic harm, so the pleading requirement is met directly either way. [SAC,
 27 15:19-21, 11:20-22, 22:4-5]. Finally, the Ninth Circuit has recently ruled, TCPA
 28

1 violations by their very nature invade privacy and thus confer injury-in-fact
2 standing that equally easily meets the “any” damages CLRA Section 1780
3 standard. *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th
4 Cir. 2017).

5

6 **F. Defendants’ Theory Of Consent To The Ninth and Tenth Claims Is Based**
7 **On Their Fatal Mistake Regarding The Established Business Relationship**
8 **Defense And Its Opt Out Notice Element.**

9 The Second Motion To Dismiss tries to argue a convoluted theory of consent
10 to the ninth and tenth claims for trespass to conversion and chattel, that Plaintiffs
11 “consented” because Defendants included an opt out in their fax ads. As discussed
12 in Section A, above, putting an opt-out notice on a junk fax ad does not magically
13 make a fax legal. The opt out language is the last of three required elements to
14 prove up an “established business relationship” defense. Defendants lack both of
15 the first two required elements, namely the “established business relationship”
16 formed prior to the junk fax transmission and obtaining the fax number through a
17 voluntary communication or publication of the recipient. The lack is both
18 evidentiary and, more importantly here, in the pleadings. Since Defendants have
19 made a fatal mistake in their misunderstanding of the established business
20 relationship defense, their consent argument based on that mistaken understanding
21 is equally incorrect. Furthermore, the FAC directly alleges that Defendants were
22 never given any consent. [SAC, 11:1-2, 14:27-28].

23

24 **G. The Cause Of Action For Conspiracy Is Only In The Complaint To**
25 **Highlight The Agency Theories**

26 Of course the general conspiracy is not a cause of action. It was included by
27 Plaintiffs’ prior counsel simply to highlight the agency relationships between the
28 Defendants. While this point could have been drafted in a clearer fashion, it

1 highlights the agency aspects of the case and should not be removed from the
2 complaint

3

4 **V. CONCLUSION**

5 For all the foregoing reasons, Plaintiffs request that the Court sustain
6 Objection #1 and strike the entire late-filed Second Motion to Dismiss, sustain
7 Objection #2 and strike the entire standing argument in the motion, and/or deny the
8 motion in its entirety.

9 In the unlikely event the Court is inclined to grant any of the motion as it
10 relates to standing and subject matter jurisdiction, remand is non-discretionary and
11 Plaintiffs request costs and attorney's fees. Plaintiffs have expended attorneys fees
12 and costs in the amount of \$82,958.65 since remand to this Court. Plaintiff
13 requests that the Court order this sanction against Defendants and/or their
14 attorneys, or in the alternative, set an Order To Show Cause Regarding Sanctions
15 and set a briefing schedule.

16

17 DATED: September 4, 2017

18 **PRATO & REICHMAN, APC**

19

20

21 /s/ Christopher J. Reichman _____
22 By: Christopher J. Reichman, Esq.
23 **Prato & Reichman, APC**
24 Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing instrument as well as all attached documents were served upon all counsel of record in the above entitled and numbered cause on the date listed below.

X Via ECF

Gene S. Stone, Esq.
gstone@homan-stone.com
HOMAN & STONE
12 North Fifth Street
Redlands, CA 92373

DATED: September 4, 2017

PRATO & REICHMAN, APC

/s/ Christopher J. Reichman
By: Christopher J. Reichman, Esq.
Prato & Reichman, APC
Attorneys for Plaintiffs